

paying you, that fact alone means that I'm in the back-seat.⁵² Even today during court this morning, I'm in the back-seat.⁵³ Always the secondary person.

He said that at times we had made him conscious that he was different and specifically treated him as if he was "an indigent mentally as well as physically." He felt that this treatment suggested that we expected him to exhibit a kind of "laziness, nonchalance." He gave specific examples of conversations in which the students had reminded him of the importance of attending various court dates. He asked, "Why must I qualify myself, reveal my soul to you, convince you that I wasn't there for good reasons?"⁵⁴

Our client then spoke more directly about how it seemed we were treating him "differently."

I have a big thing about respect. Sometimes it was as if you were talking to a child, trying to make me understand as if I had no common sense. . . . Do you guys actually think I'm stupid, lazy and slow? Most black people have that stereotype, of being that way. You don't know that? . . . The way you guys talk to me and approach me—it's a little like the way Trooper Kiser approached me.

Up to this point, Johnson had been speaking primarily to the two student attorneys. But he then turned his attention to me.

You're the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers. Oversensitivity. Patronizing.⁵⁵ All the power is vested in you. I think you may go too far, assuming that you would know the answer.

⁵² As I recall, Johnson made this point literally by stating that whenever he and the students travelled in the same car, the two students sat in the front seat while he rode in the back. There had been several such trips because the students had offered to pick Johnson up at the bus station in Ann Arbor and take him to court.

⁵³ By this statement, Johnson was referring to the fact that he was sitting behind the bar in the audience section rather than at counsel table when the prosecutor moved to dismiss and the judge responded. I cannot recall why this was the seating arrangement. Certainly we would have had our client seated with us for the trial. Perhaps we forgot to make room for Johnson at the table when the case was called and were too surprised by the prosecutor's motion to explicitly invite Johnson to cross the bar and join us. I will confess it never occurred to me to ask Johnson if he wanted to respond to the prosecutor's motion himself or to speak directly to the judge.

⁵⁴ Apparently Johnson was referring, at least in part, to a telephone conversation with one of the student attorneys in which the student encouraged him to attend the hearing during which the troopers would be examined and to a later telephone discussion when one of the students asked him why he failed to appear for that hearing. See *supra* note 31.

⁵⁵ This was the second time that day Johnson had used the word "patronizing." The first time was in reference to the judge's speech in the courtroom. See *supra* p. 1329.

And here the story ends, at least the story of my efforts to represent Dujon Johnson.⁵⁶ After the symposium, but before the trial date I had thought of changing that earlier article into *A Tale of Three Clients*, by adding Johnson's case to illustrate how the translation approach could be applied. But faced with Johnson's devastating critique, I quickly changed the title back to *A Tale of Two Clients*. I was hesitant to assume "that I knew the answer"; indeed, I was sure I did not understand "what had happened" well enough to write about it.

But in a sense, the story has continued, as I have presented this case to various audiences, thought about it, and finally attempted to write about it. The next sections tell the story of my struggle to understand what happened, and thereby test the translation metaphor as a way of both thinking about and changing the way I practice law.

II

TRANSLATION AS A METAPHOR FOR LAWYERING

My ideas for describing the practice of law as a kind of translation have their foundation in a very simplified theory of knowledge. This theory uses a model of mental activity divided into three separate levels: sensation, experience, and knowledge. In this model, the level of sensation consists of the raw input from the external world, the complex pattern of nerve impulses from the sensory organs. This is the lowest level of animate being; pure sensation can stimulate an animate response but cannot be consciously experienced in that form. In order for sensation to rise to the level of experience it must be sorted and structured in relation to independent forms of intuition. For example, the impulses from the optic nerve are sensation; visual perception is experience. We perceive an object as having a certain shape, size, and position, all in relation to an inherently assumed space.⁵⁷

Instead of a sharp dichotomy between an external "real" world and an internal "subjective" world, this model postulates a dynamic relation. The internal world we experience is *constituted* out of sense

⁵⁶ On that last day, we did discuss with Johnson the possibility of a civil rights suit against the troopers. He was quite interested in such a suit; unfortunately, we had to tell him later that our clinic was not able to take on that kind of litigation. I did contact the director of the Michigan ACLU, who indicated they might be interested in assisting Johnson. Two months after the trial date, I left Michigan to take my current job, but I wrote a long letter to Johnson referring him to both the ACLU and several private attorneys who did civil rights litigation. I also said in that letter that I had called both the Michigan Civil Rights Commission and the Intra-departmental Affairs Office of the state police and had been told that both agencies would review any complaint he filed with them regarding the arrest.

⁵⁷ See I ERNST CASSIRER, *PHILOSOPHY OF SYMBOLIC FORMS* 100-01 (Ralph Manheim trans., 1953).

data derived from the external world. A similar relation is proposed linking the levels of experience and knowledge. Knowledge is neither independent of nor simply dependent on experience; rather, the conceptual world is constituted out of the elements of experience.

In this model, language plays a central role in the constitution of knowledge out of experience. The very process of naming reduces the particularity of experience to reveal inherent factors of form and relation, and then formalizes and stabilizes them.⁵⁸

This model differs from both empiricism and idealism. It asserts that concepts are neither abstracted from empirical objects nor derived from transcendent ideals, but rather are *realized* in the process of objectifying experience. By giving a name to experience, consciousness frees itself from passive captivity to sensation and experience and creates a world of its own, a world of representation. It is this world of representations that we "think" about and communicate to others.

The world of representation, the realm of knowledge, is in a dynamic relation with the world of experience. Initially, experience gives rise to the concepts which can be known and communicated. However, these forms of knowledge in turn may alter the way in which we experience, just as the forms of intuition structure our sensations.⁵⁹ Under this model, "reality," as we know it, is neither simply "out there" nor merely a social construction.⁶⁰

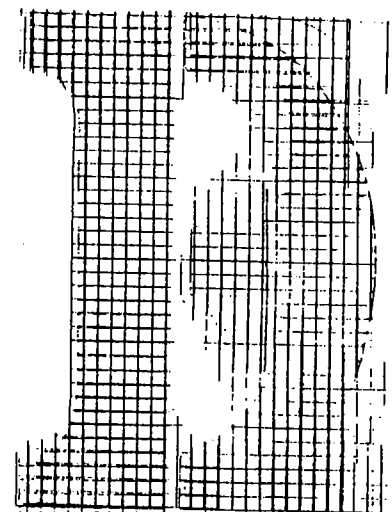
One way I have attempted to explain this model of knowledge to my students is to show them the following picture on an overhead projector:

⁵⁸ *Id.* at 281.

⁵⁹ For discussion of a scientific experiment that appears to show language differences influencing actual perceptions of color, see Cunningham, *supra* note 41, at 2475-79.

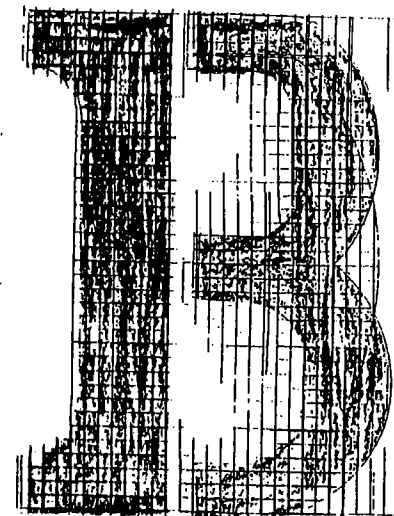
⁶⁰ This rather simple epistemological model resembles in many ways Steven Winter's experientialist approach, which I find very congenial. See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2230-55 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1152-59 (1989). Feminist epistemology has played an important role in emphasizing to legal scholars the importance of experience and context in conceptualization. See Bartlett & Goldfarb, *infra* note 63, and sources cited therein.

FIGURE 2A



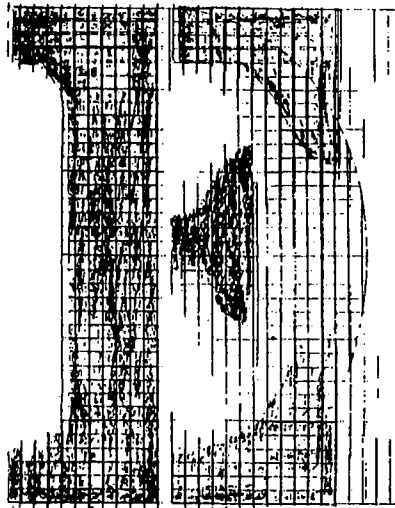
I ask them what they see in this picture; most respond that they see nothing but a lot of lines. I then overlay a second transparency with the shape of a capital *B* highlighted in color:

FIGURE 3



Next I repeat the process using a transparency highlighting the shape of a capital E:

FIGURE 4



Seeing a letter in the picture requires them to exclude part of the picture and focus only on certain lines. Whether they see a *B* or *E* depends on what they exclude and what they emphasize. These letters are neither simply "in" the picture⁶¹ nor imposed on it by the color frames. Rather the letters are constituted out of the bewildering array of lines through a process of selection and exclusion.

The "framing" metaphor created by this exercise, although helpful in clarifying my abstract model of mental activity,⁶² overemphasizes exclusion and deemphasizes the equally important concept that language and other forms of knowledge *add* something in the process of constituting experience. The framing metaphor also suggests a unilateral progression from experience to knowledge rather than a dynamic interaction in which the mind moves back and forth

⁶¹ One might suggest my illustration is fundamentally flawed because both letters were "in" the picture before the framing exercises—I created the initial picture by overlapping pre-existing pictures of "B" and "E." Although I did create the picture in this way (actually I also added pictures of "K" and "D"), students also plausibly saw other patterns in the picture, such as "F" and "13," that I did not "put" there. Indeed, "13" may be a more plausible pattern because to "see" the letter "B," one must "fill in" gaps between the upright and horizontal strokes according to the conventions of Gothic typeface, while the gaps are consistent with the standard image of "13."

⁶² For an analogous use of "framing" to discuss the exclusionary nature of legal narratives, see Scheppelle, *supra* note 42, at 2085.

from experience to knowledge, always testing concepts against experience, the results of which in turn are used to create altered concepts.⁶³

The idea of translation captures and communicates more of the theoretical model than the narrower metaphor of framing. In applying the word "translation" to the practice of law,⁶⁴ I have been influenced by James Boyd White's presentation of translation as a complex and creative practice requiring of the translator both high art and a demanding ethic. White uses the etymology of "translation" (from the Latin "*trans*" (across) and "*latus*" (carried)) to illustrate what he considers a common but fundamental epistemological mistake about the nature of language and translation.⁶⁵ To think of translation as "carrying across," transportation, is to treat language as if it were simply a vehicle for transporting invariable meanings from the shores of one mind to another. But White persuasively argues that meanings invariably change as part of the "trip" because they do not exist apart from language.⁶⁶ Borrowing from the terminology of the Spanish linguist Ortega y Gasset, White describes every translation as involving two kinds of meaning transformation:

⁶³ Katherine Bartlett has advocated a form of feminist epistemology she terms "positionality" that similarly emphasizes a dynamic relationship between experience and knowledge. See Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990). Phyllis Goldfarb has applied such an epistemology to describe how the clinical approach to legal education promotes the use of experience to develop and test theory. See Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991).

⁶⁴ The translation metaphor is appearing more and more often in legal scholarship. See, e.g., Gerald Lopez, *supra* note 4 at 11 (in lawyering, a representative "translates and, if necessary, transforms" the story a person is living into a story that an audience "can identify, believe and find compelling"); Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544 (1987-88) (legal culture defines the attorney's core role "as that of a translator who serves to shape her client's experiences into claims, arguments and remedies that both the client and judge can understand"); Nancy Rourke, *The Language of the Law: A Comment on the Legitimacy of the Adversarial Trial*, 1990 Annual Meeting of the Law & Society Association 8 ("It is fairly widely acknowledged that lawyers engage in a process of translation, changing the client's problem into a claim the law can recognize."). There are strong similarities between the translation metaphor and the concept of "voice" in feminist legal scholarship. See, e.g., Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Lucinda Finley, *Breaking Women's Silence: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOYRE DAME L. REV. 886 (1989); Carrie Menkel-Meadow, "Partia in a Different Voice: Speculations on a Women's Lawyering Process," 1 BERKLEY WOMEN'S L.J. 39 (1985); Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VERMONT L. REV. 139, 141, 144-45 (1990). For an interesting description by a linguistic anthropologist of legal education as the teaching of a new language, see Susan Philips, *The Language Socialization of Lawyers: Acquiring the "Cant"*, in *DOING THE ETHNOGRAPHY OF SCHOOLING* 177 (G. Spindler, ed. 1982).

⁶⁵ JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 233-34 (1990).

⁶⁶ *Id.* at 234-35.

deficiency and exuberance.⁶⁷ Deficiencies are aspects of meaning of the original expression not replicated in the translated expression; exuberances are aspects of meaning that appear in the translation but are not part of the original.⁶⁸ Because, for White, meaning is inextricable from language, to become aware of the deficiencies and exuberances of a translation is to become aware of the limits and potentialities of one's own mind and of the mind of another.

According to White, these epistemological implications of translation make translation a model for a kind of ethic:

[Translation] recognizes the other—the composer of the original text—as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by motives of dominance or acquisition, but by respect. It is a word for a set of practices by which we learn to live with difference It is not simply an operation of mind on material, but a way of being oneself in relation to another being. . . . The activity of translation . . . offers an education in what is required for [the] interactive life [of lawyering], for . . . to attempt to "translate" is to experience a failure at once radical and felicitous: radical for it throws into question our sense of ourselves, our languages, of others; felicitous, for it releases us momentarily from the prison of our own ways of thinking and being.⁶⁹

The following story of how the English word "lawyer" could plausibly be translated as "translator" is intended to illustrate how through translation one can recognize profound difference, respond to that difference with imagination and mutual education, and expand the meaning of one or both languages.

Imagine an American lawyer visiting the court of the emperor of China in 1800.⁷⁰ Through a Mandarin translator, he starts to tell the emperor that he is a lawyer, only to be informed by the translator that there is no word in Mandarin for "law." The closest approximation is the word *fu*, meaning "punishment" or "sanction."⁷¹

⁶⁷ *Id.* at 235.

⁶⁸ *Id.*

⁶⁹ *Id.* at 257.

⁷⁰ My assumption that an American lawyer in 1800 would describe the practice of law as we would today is no doubt anachronistic. In fact, in the pre-Revolutionary period, many colonies shared the Chinese attitude reflected in this story by barring lawyers from court and prohibiting pleading for hire. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 81-82 (1973). However, by 1835, if we are to believe de Tocqueville, lawyers enjoyed the highest status and influence in American society. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284-90 (1973).

⁷¹ In constructing this story I was assisted by my colleague, William Jones, a translator of Chinese legal texts. See *A Translation of the General Provisions of Civil Law of the People's Republic of China*, 13 REV. SOCIALIST L. 357 (1987); Translation, *Fourth Draft of the Civil Code of the People's Republic of China*, 10 REV. SOCIALIST L. 193 (1984).

Thus, if the translator described the American as one who practices *fu*, the emperor would assume that he was a judge, one who administers punishment.

The American is encouraged to learn that at least the emperor has a word for "judge," but the translator quickly informs him that a better translation for the title of the Chinese official who administers *fu* would be "magistrate," because such officials exercise administrative as well as judicial functions.⁷² The American then asks the translator if there is a word for a person who assists those appearing before a magistrate. The translator replies there is, *song-gun*, but suggests against using the word because it is a term of scorn, perhaps similar to the word "shyster."⁷³ He explains to the puzzled American that in Chinese "courts" the parties always represent themselves. Illiterate persons often employed the services of a scrivener, but these scribes were generally prohibited from giving advice or trying to influence the magistrate's decision. A scrivener who ignored such prohibitions was called a *song-gun*. Thus there is no word for a professional court advocate, and indeed no noun "advocate."

The translator asks the American to explain what exactly a lawyer would do in a court. The American suddenly decides to use the translator himself as an example, saying that as he helps the lawyer explain himself to the emperor, so too the lawyer helps his client explain his case to the judge. The language gap between the speakers of different languages is thus bridged by a common experience: the event that the emperor and the American are sharing at the very moment. This move may be especially plausible in this context because for both Anglo-American and Chinese cultures there has been a similar evolutionary relationship between the court of a ruler, literally the physical space where subjects can approach the ruler and be heard (the space where the American is now located),⁷⁴ and the court of a judge (the space where he functions as a lawyer). For both cultures "court" has shifted in meaning from a specific location

⁷² For a fascinating description of a Chinese Magistrate, see CELEBRATED CASES OF JUDGE DEC, (Robert Vangulik trans., 1976)(anonymous 18th century detective novel based on the legendary exploits of the famous Tang dynasty Judge Dec Jen-djih (630-700 A.D.)).

⁷³ Jones, *supra* note 71, informs me that *song-gun* literally means "litigation stick," i.e., one who "stirs up" litigation. "Shyster" apparently entered the English language around 1840, derived either from the name of a specific New York lawyer, Scheuster, frequently rebuked for pettifoggery, see WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967) "shyster" (at 306), or from the German word *Scheisse*, meaning excrement, see STUART BERG FLEXNER, I HEAR AMERICA TALKING: AN ILLUSTRATED TREASURY OF AMERICAN WORDS AND PHRASES 167 (1976).

⁷⁴ Indeed, "Court" originally meant something like "yard," thus showing the common link among such diverse uses as "tennis court," "court of law," and "courtyard."

in a ruler's residence to one of the key functions once performed in such a space.

This exercise in translating "lawyer" might lead the American, the Chinese translator and, through him, the emperor to a new understanding of what happens in their respective "law courts," by suggesting the gap between the language used by the parties and the language used by the judge might be large enough to require the services of a "translator," even though both might have previously assumed that everyone in their respective courts was speaking the "same language," either English or Mandarin.

The translation metaphor suggests that the introduction of a "new word" (typically by expanding the meaning of an existing word by using it in a novel way) can dramatically affect a person's understanding of experience. Indeed, by discussing lawyering as a kind of translation, I am myself using "translation" as a "new word" in an effort to expand my understanding of my experience of practicing law. As linguist George Lakoff and philosopher Mark Johnson have suggested, a novel metaphor can "defin[e] reality"⁷⁵ by making "coherent a large and diverse range of experiences."⁷⁶ The process they describe by which a metaphor "defines reality" by highlighting "certain aspects of our experience" and blocking others⁷⁷ resembles the model of mental activity discussed above. More recently, Lakoff has suggested that metaphors create meaning primarily by "mapping" from one domain of experience to a corresponding conceptual structure in another domain of experience.⁷⁸ For example, the American in my story "mapped" the domain of experience from appearance in a royal court onto the domain of the courtroom by taking advantage of structural and other similarities between the two domains.

The translator's ethic compels a continuing cycle in which the translator must continually confront the flaws of the expression he is creating in the second language, return to the "other" in the first language, and then begin the endeavor anew.⁷⁹ For White, this cycle impels the translator toward a high art he terms: "integration: putting two things together in such a way as to make a third, a new thing with meaning of its own . . . not to merge the two elements or

⁷⁵ George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, 77 J. PHIL. 453 (1980). This article summarized ideas which are developed more thoroughly in a book by the same authors, *METAPHORS WE LIVE BY* (1980).

⁷⁶ *Id.* at 484, 485.

⁷⁷ *Id.* at 484.

⁷⁸ GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 114 (1987).

⁷⁹ This cycle resembles the "theory-practice spiral" discussed by Goldfarb, *supra* note 63.

blur the distinctions between them, but to sharpen the sense we have of each, and of the differences that play between them."⁸⁰ This art must be constantly "remade afresh, in new forms."⁸¹

Through the preceding narrative (and in my interpretations of this story in Part IV) I hope to recreate my sense of having participated in such a cycle: of creating meaning only to discover its limits, returning anew to discover what aspects of the client's experience were excluded, trying again, failing again, yet trying once more. For this reason I have told the story of representing Johnson as I understood it at the time, which meant that some details of what happened were sometimes introduced not in chronological sequence, but rather at a later point when they first developed meaning for me.

III

STUDYING TEXTS OF THE REPRESENTATION OF A CLIENT

A. The Roots of Ethnography in Cultural Anthropology

The metaphor of the lawyer as translator would seem to lead naturally to the metaphor of "representation as text" if the client's story is viewed as a text for the lawyer to translate for legal audiences. "Text" also suggests an analogy to literary interpretation, which is the primary disciplinary cross-fertilization that gives rise to use of the translation metaphor by James Boyd White.⁸² Although the methods of literary interpretation do influence this approach, they are brought to bear through a circuitous route that begins in cultural anthropology—and in the remote islands of Indonesia.

In thinking of my representation of Johnson as a text, I am taking as my model the practice of ethnography,⁸³ initially developed in cultural anthropology and since applied in a number of sociological methodologies. A cultural anthropologist traditionally created an ethnography by living in a foreign (usually exotic) society for an extended period. This "field work" involved becoming a "participant-observer," participating in the daily life of the society as much as

⁸⁰ WHITE, *supra* note 65, at 263.

⁸¹ For me the translator's art of integration can be a useful metaphor for the kind of multiple consciousness advocated by critical race theorists. See Delgado, *supra* note 14; Matsuda, *supra* note 14; Patricia Williams, *The Obliging Shell*, 87 MICH. L. REV. 2128, 2151 ("It is this perspective, the ambivalent, multivalent way of seeing that is, I think, at the heart of what is called critical theory, feminist theory, and the so-called minority critique. It has to do with a fluid positioning that sees back and forth across boundary. . . . Nothing is simple. Each day is a new labor.").

⁸² Besides being a law professor, White is also a professor of English Literature.

⁸³ Translating its Greek components literally, ethnography means "nation writing" (ethnos—nation; graphein—to write) in the same way that geography means "earth writing." A geography of a country describes (writes down) its terrain and other physical features; an ethnography of a country describes the people who live there.